Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning the Deployment of	)	
Advanced Telecommunications	)	
Capability to All Americans in a	)	CC Docket No. 98-146
Reasonable and Timely Fashion, and	)	
Possible Steps to Accelerate Such	)	
Deployment Pursuant to Section 706	)	
Of the Telecommunications Act of 1996	)	

REPLY COMMENTS OF THE CITY OF CARROLLTON, TEXAS

GEOFFREY M. GAY
GEORGIA N. CRUMP
Lloyd, Gosselink, Blevins, Rochelle, Baldwin
& Townsend, P.C.
111 Congress Avenue, Suite 1800
Austin, Texas 78701
(512) 322-5800

Attorneys for

THE CITY OF CARROLLTON, TEXAS

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I. INTRODUCTION

These Reply Comments are submitted by the City of Carrollton, Texas, (the "City") in response to comments submitted by Metromedia Fiber Network Services, Inc. ("MFN") regarding the alleged experiences of MFN with the City. MFN's comments include unsubstantiated and erroneous statements that cannot be allowed to remain unchallenged in the record.

MFN has cited its alleged experiences in the City as evidence of the need for the Commission to recommend additional legislation creating "disincentives" for municipal behavior of the type described in its comments. The City denies that any municipal actions have created barriers to MFN's entry into the market. Adequate remedies exist under state law for MFN or any provider to pursue if they believe that any Texas municipality is acting unlawfully. Indeed, MFN has availed itself of these statutory remedies, as described in its comments. Therefore, no additional legislation or rule-making is necessary.

The Commission's Third Notice of Inquiry into whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion requested data and empirical evidence on the deployment of advanced telecommunications services to Americans. Instead of providing such data or empirical evidence on whether advanced services are being provided to certain categories of customers and on developments in technology that would accelerate such deployment, MFN has chosen to provide anecdotal evidence of its alleged experiences with the licensing and permit requirements of three municipalities, including the City of Carrollton, as support for its proposals that the Commission recommend legislation to Congress and act as a national right-of-way manager. MFN's global statements about "parochial

governments anxious to place tolls on the information highway,"[1] "uncooperative jurisdictions,"[2] "illegal demands for franchise fees,"[3] "illegal government demands," are simply not supported by the facts, and are an attempt to obscure the record.

The right-of-way management issues raised by MFN are issues appropriately left to determination under state law. In fact, MFN's issues regarding the City of Carrollton have been addressed by the procedures available to MFN under state law; MFN challenged the City's actions at the Public Utility Commission of Texas and was granted some measure of relief by that state administrative body.[4] MFN's suggestion that additional federal legislation is required because of its Texas experience is over-reaching and also violates Section 253(c) of the Federal Telecommunications Act of 1996, wherein Congress has expressly denied the Commission jurisdiction. As MFN's comments illustrate, in each of the three cities in which MFN claims to have had problems, it has exercised the remedies available to it, and has obtained decisions from administrative or legal authorities. Therefore, additional remedies or "disincentives" are not needed.

II. NO BARRIER ERECTED IN TEXAS

MFN claims in its comments that the City of Carrollton insisted that MFN pay to the City fees higher than those allowed by state law, and "illogically argued" that MFN was not qualified as a Certificated Telecommunications Provider ("CTP") under state law. To the contrary, the

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1 Comments of MFN at 2.

2 *Ibid*.

3 *Ibid.*

4 In PUC Docket No. 24480, MFN was denied the emergency relief it requested. The Company appealed that denial and then dropped its appeal. A legal question was certified to the Commission, and the answer to the question construes Texas law to preclude a city from requiring a permit for a Company previously granted CTP status irrespective of whether that Company offers local exchange service. The case is still pending before the Commission, awaiting a hearing on contested facts.

City reasonably interpreted state law and applied its right-of-way management ordinance. Any delays suffered by MFN were of its own making and were not caused by any unlawful act of the City.

The City of Carrollton adopted a right-of-way management ordinance that requires every entity intending to excavate in the public the rights-of-way to obtain a permit from the City for such work. If a CTP obtains a permit, then it must pay compensation to the City based upon the number of access lines provided in the City, as defined by Chapter 283 of the Texas Local Government Code and the regulations of the Public Utility Commission of Texas ("PUC") adopted pursuant thereto. Under the City's ordinance, non-CTPs are required to obtain a permit and to pay the City a fee based upon the number of linear feet of right-of-way to be occupied.

A bona fide dispute existed between MFN and the City regarding MFN's planned construction and whether MFN qualified as a CTP under the provisions of Chapter 283. MFN was not initially forthcoming with information regarding whether it would have an end-use customer within the City. Additionally, there was a dispute as to whether a CTP with no local exchange customers in the City also qualified as a CTP under Chapter 283. MFN represented itself to the City as a dark fiber provider with no local exchange service and no switched or voice-activated access lines.

The City took the reasonable position that if MFN was not qualified as a CTP under Chapter 283, then the City could require MFN to pay the linear foot fee to the City for the right-of-way permit. Indeed, the City was partially basing its decision on a letter issued by the PUC staff in a dispute involving another Texas city, in which the PUC staff stated that:

> Regardless of whether the provider is a CTP, both Chapter 283 and Commission rules clearly define access lines within the framework of Chapter 283 in terms of the transmission and delivery of local exchange service. In other words, contrary to MCIM's assertion, the statute and rules both take into consideration the type of

> service being provided (local exchange) and the lines over which that service is delivered (access lines). Allowing providers to include inter-exchange lines under this framework would subvert the intent of the law and the policy of the Commission.[5]

Thus, the position of the City that MFN has branded as "illogical" in its comments was based upon precedent from the PUC and upon a reasonable interpretation of the controlling state law. The City was well aware of a pending rule-making proceeding at the PUC in which interested parties had filed comments on whether, under circumstances similar to those presented by MFN in Carrollton, the telecommunications provider qualified as a CTP for purposes of Chapter 283.[6] This rule-making proceeding had been pending at the PUC since at least November 2000 when initial workshops were conducted. As the City indicated to MFN when it first approached the City, this issue was "hotly contested," and was not "well-settled law" as alleged in MFN's comments.

When MFN filed its complaint with the PUC, the Administrative Law Judge of the PUC determined that, indeed, there existed in these circumstances a question of unsettled state law, and the Judge requested guidance from the PUC in the form of a certified question. Under § 22.127 of the Procedural Rules of the PUC, issues or questions of the following types are appropriate for certification: (1) the commission's interpretation of its rules and applicable statutes; (2) which rules or statutes are applicable to a proceeding; or (3) whether commission policy should be established or clarified as to a substantive or procedural issue of significance to the proceeding.[7] Clearly, if the applicability of Chapter 283, Texas Local Government Code, and the PUC's rules to the circumstances faced by MFN and the City were a matter of "well-settled

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5 April 23, 2001 letter from Hayden Childs of the PUC to Richard Strom, attorney for MCIMetro.

6 PUCT Docket No. 22909.

7 Procedural Rules of the Public Utility Commission of Texas, § 22.127.

law" as claimed by MFN in its comments, the Administrative Law Judge would not have found it necessary to submit the certified question to the Public Utility Commission.

MFN's claim of irreparable damages as a "result of refusing to accede to Carrollton's demands" is completely insupportable. MFN claims that it was unable to provide service to its customer within the time frame anticipated, resulting in additional construction costs, lost revenue, and damage to its service reputation.[8] The facts belie MFN's allegations, and show that MFN really has no supportable complaint to bring to this Commission. MFN waited to first approach the City for excavation permits until July 17, 2001, knowing that it had contracted to provide service to a customer by August 28, 2001. By its own admission, MFN knew it had to have permits issued by the City in 2 1/2 weeks, or no later than August 3, 2001, in order to meet its contractual commitment. After MFN's initial contact with the City, the City and MFN were in frequent communication attempting to establish the facts regarding MFN's proposed service and to determine whether MFN's application met the requirements of the City's ordinance. These communications continued right up until MFN filed its complaint with the PUC on August 3, 2001.

The City did not impose these tight time frames on MFN, nor was the City consulted in advance as to how long the permitting process would take. Any time squeeze experienced by MFN between the date it applied for a permit and the date it needed to be ready to provide service was entirely self-inflicted. Neither MFN nor any provider has the right to either expect or demand an immediate turn-around on permit requests by any municipality, yet that seems to be the basis for MFN including the City of Carrollton in its comments.

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[8] Comments of MFN at 9.

The City's action in refusing to immediately issue MFN a permit was also soundly based in the City's police powers, and was in the interest of public safety. The City's ordinance requires all permittees, including CTPs, to provide to the City plans regarding the permittee's location and presence in the rights-of-way. MFN's permit application did not include plans that met the City's requirements. State law specifically articulates that in addition to advancing competition and ensuring fair compensation to municipalities, it is the policy of the state of Texas that municipalities "retain the authority to manage a public right-of-way within the municipality to ensure the health, safety, and welfare of the public." TEX. LOC. GOV'T CODE ANN. § 283.001(b)(1). MFN states in its comments that it has no quarrel with right-of-way management ordinances adopted by municipalities, yet its failure to comply with the City of Carrollton's ordinance has prevented it from obtaining a permit to excavate the City's streets.

It is interesting to note that MFN's comments in the City Signal Petition for Declaratory Ruling at the Commission (CS Docket No. 00-253, *et seq.*), singled out the state of Texas as a state "where things are working."[9] MFN cited Texas as a model for all states in its right-of-way management. MFN's comments in that case have proven to be prophetic - when a Texas municipality interpreted the state statutes in a manner with which MFN disagreed, it was able to take advantage of the remedies available to it under that state statute.

Clearly, no federal "disincentives" are needed; state law in Texas is in place to address the concerns of telecommunications providers if they believe that municipalities are erecting barriers to their entry into the market. As MFN has stated in its comments, it has two million fiber miles installed worldwide, and has fiber operational in 29 cities.[10] MFN is an active

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[9] Comments of Metromedia Fiber Network Service, Inc., January 30, 2001, *In the Matter of City Signal Communications, Inc. v. City of Cleveland Heights, et al.,* Docket Nos. 00-253, 00-254, 00-255, Before the Federal Communications Commission, at 30.

[10] Comments of MFN at 2.

participant in the market, and has not been subject to any barriers to its further participation in the market in the state of Texas.

Respectfully submitted on October 9, 2001:

GEOFFREY M. GAY
GEORGIA N. CRUMP
Lloyd, Gosselink, Blevins, Rochelle, Baldwin & Townsend, P.C.
111 Congress Avenue, Suite 1800
Austin, Texas 78701
(512) 322-5800

Attorneys for the City of Carrollton, Texas

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Reply Comments of the City of Carrollton, Texas" were filed electronically with the FCC on this the 9th day of October, 2001, and on the same date were sent to the following via U.S. Mail:

Tracie Bone, Senior Attorney
Metromedia Fiber Network Services, Inc.
One Meadowlands Plaza
East Rutherford, NJ 07073

Berkeley City Attorney
1947 Center Street, First Floor
Berkeley, CA 94704

Debra A. Walling
Corporate Counsel
13615 Michigan Avenue
Dearborn, MI 48126

GEOFFREY M. GAY